

FILED
OCT 20 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

JENNIFER L. EISEL,)	
)	No. CV 08-6183-HU
Plaintiff,)	
)	
v.)	
)	FINDINGS AND
MICHAEL J. ASTRUE,)	RECOMMENDATION
Commissioner, Social)	
Security Administration,)	
)	
Defendant.)	

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3 HUBEL, Magistrate Judge:

4 Jennifer Eisel brings this action pursuant to Section 205(g)
5 of the Social Security Act (the Act), 42 U.S.C. § 405(g), to obtain
6 judicial review of a final decision of the Commissioner of the
7 Social Security Administration (Commissioner) denying her
8 application for Supplemental Security Income benefits under Title
9 XVI of the Social Security Act.

10 **Procedural Background**

11 Ms. Eisel applied for benefits on June 7, 2005, alleging an
12 onset date of December 8, 2004. The application was denied
13 initially and on reconsideration. On December 14, 2007, an
14 administrative hearing was held before administrative law judge
15 (ALJ) William Stewart, Jr. In a decision dated December 28, 2007,
16 the ALJ found Ms. Eisel not disabled. After the Appeals Council
17 denied review, the ALJ's opinion became the Commissioner's final
18 decision.

19 Ms. Eisel was 36 years old at the time of the ALJ's decision.
20 She completed the 12th grade and received an office assistant
21 certificate in 2001 from Lane Community College. She has no past
22 relevant work and has not engaged in any substantial gainful
23 activity since 2000.

24 **Medical Evidence**

25 Ms. Eisel alleges disability from psychological impairments,
26 including anxiety, depression, panic disorder, and obsessive-
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1 compulsive disorder (OCD). She was treated with Zoloft and
2 Welbutrin by Nicholas Telew, M.D., who saw her for medication
3 management every two or three months from March 2004-April 2005.
4 Dr. Telew completed a Mental Status Report on January 5, 2006,
5 stating that according to his most recent objective findings, Ms.
6 Eisel had a "euthymic and stable mood," intact cognition and
7 concentration, persistence and pace, and no excess anxiety. Tr.
8 156, 158. Dr. Telew also wrote that Ms. Eisel was "responding to
9 meds" and that her ability to maintain activities of daily living
10 was intact. Tr. 157. Only six weeks later, on February 22, 2006,
11 Dr. Telew signed a form certifying that Ms. Eisel was prevented by
12 disability from repaying a student loan. Tr. 155. On the form, Dr.
13 Telew stated that Ms. Eisel had "chronic depression and excessive
14 anxiety," as well as "impaired attention/concentration." Id. Dr.
15 Telew's records do not reveal the reason for the differences in
16 these reports.

17 On March 10 and March 31, 2005, David Truhn, Psy.D., performed
18 a psychological evaluation of Ms. Eisel. Tr. 252-260. Psychometric
19 testing indicated that she had a Full Scale I.Q. of 83, falling at
20 the 13th percentile and in the low average range. Several
21 neuropsychological screening test were given. One of them was not
22 completed accurately; Dr. Truhn attributed this to anxiety that
23 interfered with her ability. Tr. 257. Achievement tests revealed no
24 significant problems in reading, math or written expression, and no
25 indication of learning disability. Id. On the Minnesota Multiphasic
26 Personality Inventory II (MMPI-II), Ms. Eisel responded in a manner
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1 similar to individuals experiencing significant psychological
2 stress; the test indicated low self esteem, depression, and
3 obsessive/compulsive behaviors and thinking. Id., tr. 260. Dr.
4 Truhn diagnosed Generalized Anxiety Disorder; Dysthymic Disorder;
5 Major Depressive Disorder, moderate, recurrent; Panic Disorder with
6 agoraphobia; and Dependent Personality Disorder with
7 obsessive/compulsive and passive/aggressive features. Tr. 259. Dr.
8 Truhn recommended a medication evaluation, individual and group
9 psychotherapy, programs to enhance self esteem, and vocational
10 rehabilitation services in order to identify strengths and
11 weaknesses. He concluded, "A sheltered workshop may help her
12 develop appropriate interpersonal skills and work behaviors." Tr.
13 260. Dr. Truhn concluded that Ms. Eisel's prognosis was guarded,
14 and that she seemed to "have little motivation to establish her own
15 support system at this time." Id.

16 On July 25, 2005, Elizabeth Lyman, MS prepared a Mental Status
17 Report cosigned by Martin Waechter, Ph.D. Tr. 132-134.¹ At that
18 time, Ms. Eisel had been receiving counseling services every two to
19 three weeks since November 3, 2003. Tr. 132. Ms. Lyman observed
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22 ¹ Under social security regulations governing weight to be
23 accorded to medical opinions, "acceptable medical sources"
24 specifically includes licensed physicians and licensed
25 psychologists, but not nurse practitioners. However, the opinion
26 of a treating nurse practitioner who works closely under the
27 supervision of a treating physician or psychologist may be
28 treated as part of physician or psychologist's opinion. A nurse
practitioner working on his or her own does not constitute an
acceptable medical source. Gomez v. Chater, 74 F.3d 967 (9th Cir.
1996). Because Ms. Lyman's assessment is cosigned by a
psychologist, it is from an acceptable medical source.

1 that Ms. Eisel dressed well, had excellent hygiene, and was prompt
2 for all appointments. Id. She recorded that Ms. Eisel was anxious
3 about "normal life issues" such as finances, housing, and parents,
4 and had low self esteem, but was beginning to have more
5 independence from her parents and that her depression was
6 subsiding. Id. Ms. Eisel was noted to "present[] with anxieties,
7 but also to be looking for ways to deal with her anxieties
8 positively and by herself." Id.

9 Ms. Lyman wrote that since beginning treatment, Ms. Eisel's
10 depression had decreased to "minimal to zero," and that she had a
11 positive attitude, increased social support, independence, and
12 confidence in herself as a parent. Tr. 133. Although Ms. Lyman
13 observed that Ms. Eisel had serious anxiety symptoms with some
14 obsessive thoughts and hypervigilance, she was also managing her
15 anxiety better. Id. Ms. Lyman opined that Ms. Eisel was competent
16 with all daily living activities, "very focused, organized, some
17 obsessiveness, excellent parent." Id. With respect to social
18 functioning, Ms. Lyman wrote that Ms. Eisel's isolation had
19 decreased, but that she had difficulty in groups of people. Ms.
20 Lyman stated that she "communicates well one on one if she's
21 acquainted with person," but still had "extreme shyness." Id. Ms.
22 Lyman characterized Ms. Eisel's concentration, persistence and pace
23 as follows: "Client able to sustain focused attention when alone or
24 with one other person, but groups she has difficulty." [sic] Ms.
25 Lyman noted "no episodes of failure to adapt since coming to
26 treatment," but that she had "not sought employment." Tr. 134.

1 Peter LeBray, Ph.D. conducted a records review on behalf of
2 the Commissioner and completed an assessment on October 24, 2005.
3 Tr. 102-116. His conclusion was that Ms. Eisel was impaired by
4 dysthymia, OCD and social phobia, and personality disorder not
5 otherwise specified (NOS). He rated her functional limitations as
6 follows: mild restriction of activities of daily living (ADLs),
7 moderate difficulty in maintaining social functioning, and moderate
8 difficulty in maintaining concentration, persistence, or pace. Id.
9 Dr. LeBray's functional capacity assessment was that Ms. Eisel's
10 interaction with co-workers should only be on an occasional basis,
11 but not at the level of special supervision or a sheltered
12 workshop. Tr. 151. Dr. LeBray noted that although Ms. Eisel was
13 occasionally distracted by affective distress, she was able to
14 complete most tasks and routines on a timely basis. Id. Dr. LeBray
15 thought Ms. Eisel's psychological impairments precluded employment
16 requiring interaction with the general public. Id.

17 On April 27, 2006, Family Nurse Practitioner Mary Fey noted
18 that Ms. Eisel reported having discontinued Wellbutrin, Zoloft and
19 Xanax four months previously. Tr. 233. A chart note written on
20 September 7, 2007, by Ms. Fey states that Ms. Eisel was "back
21 seeing Dr. Telew and has been taking her meds again for the past
22 three months. She is being treated for depression, anxiety, and
23 obsessive compulsive disorder." Tr. 227.

24 Dr. Telew's chart notes resume on July 20, 2006. Tr. 305. Dr.
25 Telew saw Ms. Eisel in November 2006 and December 2006. Tr. 301-05.
26 On February 27, 2007 [mistakenly written as 2006], Dr. Telew wrote,

1 "vague [illegible] why she can't work--unable to give any clear
2 reason, works hard to pursue disability." Nevertheless, that same
3 day, Dr. Telew signed a Certification of Disability for the Housing
4 Authority of Lane County, stating that Ms. Eisel was disabled as
5 defined by the Social Security Act, 42 U.S.C. § 423 ("[i]nability
6 to engage in any substantial, gainful activity by reason of any
7 medically determinable physical or mental impairment ... which has
8 lasted or can be expected to last for a continuous period of not
9 less than 12 months.") Tr. 261-62. Dr. Telew's notes for April 12,
10 2007 deepen the mystery, concluding as follows: "terminated with
11 patient ... referrals given for psychiatric followup--patient
12 terminated with me after I told her I don't support disability."
13 Tr. 301. Ms. Eisel submitted Dr. Telew's medical records for July
14 2006-April 2007 to the Appeals Council, but not to the ALJ.²

15 Other evidence submitted to the Appeals Council, but not to
16 the ALJ, indicates that on January 29, 2008, Ms. Eisel was admitted
17 to Sacred Heart Hospital with abdominal pain and suicidal ideation.
18 Tr. 277. At that time, Ms. Eisel reported that she had attempted
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22 ² In Ramirez v. Shalala, 8 F.3d 1449, 1452 (9th Cir. 1993),
23 the court held that when the Appeals Council declines to review
24 the decision of the ALJ, but reaches its ruling after considering
25 the case on the merits, examining the entire record, including
26 additional material not submitted to the ALJ, and concludes that
27 the ALJ's decision was proper and that the additional material
does not provide a basis for changing the hearing decision, the
court considers both the ALJ's decision and the additional
material submitted to the Appeals Council. See also Bates v.
Sullivan, 894 F.2d 1059, 1063-64 (9th Cir. 1990).

Ms. Eisel testified that she last worked in 2000, for a period of "one to two days" at the Lane County Fair. Tr. 311. Her last job before that was in 1993. Tr. 325. She has not tried to work since 2000. Tr. 312. She said she was unable to work because she had problems dealing with people on a social level, taking constructive criticism, and working too slowly. Id. She does not socialize with anyone but her children, ages 13 and six and a half, id., but has a boyfriend. Tr. 317. Criticism makes her feel "attacked." Tr. 313. She has difficulty comprehending and feels panicky and frustrated. Tr. 314. While working at the County Fair job, she became flustered and anxious as she got busier. Tr. 324. She is a perfectionist about her house, constantly cleaning and re-arranging furniture. Tr. 316. She gets help from her boyfriend, her parents, and her counselor. Tr. 318. She takes Xanax for anxiety and help in sleeping, but is not currently taking anything else. Tr. 321.

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³ At her psychological evaluation by Dr. Truhn in March 2005, Ms. Eisel reported that in high school, she took an overdose of aspirin "to get attention." She said she had not had any suicidal thoughts since then. Tr. 252.

1 The ALJ called a vocational expert (VE), Mark McGowan. The ALJ
2 asked the VE to consider an individual of Ms. Eisel's age,
3 education and relevant work experience, with moderate limitations
4 in her ability to: maintain attention and concentration for
5 extended periods; maintain a rapid pace; engage in cooperative
6 interactive teamwork endeavors; interact with the public,
7 especially in crowded conditions; and establish her own work plans
8 and goals. Tr. 327. The VE identified the occupations of industrial
9 sweeper/cleaner, an unskilled job; housekeeper/cleaner, unskilled;
10 and meter reader, unskilled. Ms. Eisel testified that she had tried
11 to work as a cleaner in the past, but had been told she was too
12 slow. Tr. 329.

13 Ms. Eisel's attorney asked the VE whether an individual with
14 marked limitations in the ability to: maintain attention and
15 concentration for extended periods; complete a normal workday and
16 work week without interruptions from psychologically based
17 symptoms; perform at a consistent pace without an unreasonable
18 number and length of rest periods; and act appropriately with the
19 general public would be precluded from any of the jobs he had
20 named. Tr. 331. The VE testified that such limitations would
21 preclude the individual from full-time competitive employment.

22 **ALJ's Decision**

23 The ALJ found that Ms. Eisel had the following severe
24 impairments: depression/dysthymia; anxiety/social phobia; panic
25 disorder with agoraphobia; mild obsessive compulsive personality
26 traits; and dependent personality disorder, with passive aggressive
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1 traits. Tr. 17. He found her to be mildly restricted in activities
2 of daily living, consistent with the opinion of Dr. LeBray, and
3 able to manage independently and care for her children. Tr. 18.
4 Also consistent with Dr. LeBray's opinion, the ALJ found that Ms.
5 Eisel had moderate difficulties with social functioning, including
6 anxiety in crowded places, but that treating source records
7 referred to her ability to manage appropriate individual
8 interactions. Id. The ALJ accepted Dr. LeBray's opinion that Ms.
9 Eisel had moderate limitations with regard to concentration,
10 persistence or pace because of anxiety symptoms, but that she had
11 no cognitive limitations. Id. The ALJ found that Ms. Eisel's
12 ability to raise her children suggested that she could manage to
13 concentrate and persist, and that Dr. Telew had concluded that Ms.
14 Eisel had no limitations with respect to concentration, persistence
15 or pace. Id.

16 The ALJ gave very little weight to Dr. Telew's certification
17 that Ms. Eisel was disabled as defined by the Social Security Act,
18 on the grounds that 1) it lacked narrative explanation; 2) it did
19 not reveal when Dr. Telew had last seen Ms. Eisel, and the last
20 chart note of January 6, 2006, stated that her mood was stable, she
21 had no excess anxiety, and no deficits with regard to
22 concentration, persistence and pace, or activities of daily living.
23 Tr. 21. Moreover, the ALJ noted that the finding of disability
24 under the Social Security Act is an opinion on the ultimate issue
25 reserved to the Social Security Commissioner. Tr. 22.

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1 The ALJ found Ms. Eisel's testimony about the intensity,
2 persistence and limiting effects of her symptoms not entirely
3 credible because it was inconsistent with the findings of treating
4 professionals. Tr. 19. The ALJ found that treating professionals
5 referred to her as focused and able to manage her daily affairs;
6 responding well to counseling and prescribed medication; and able
7 to perform regular work activity within the functional limitations
8 identified by the residual functional capacity assessments. Tr. 23.
9 The ALJ cited the July 2005 assessment by Ms. Lyman and Dr.
10 Waechter in which Ms. Eisel was found to have anxiety symptoms,
11 obsessive thoughts and some hypervigilance, but also excellent
12 hygiene, timely appearance for appointments, a positive attitude,
13 increased social support, more independence from her parents,
14 confidence in herself as a parent, the ability to sustain focused
15 attention when alone or with another person, and the ability to
16 live independently with her children. The ALJ also cited the
17 evidence from Dr. Telew that Ms. Eisel was responding well to
18 medication and that her concentration, persistence and pace were
19 intact; Dr. LeBray's assessment that Ms. Eisel was only moderately
20 limited in maintaining attention and concentration; and Dr. Telew's
21 notes of January 2006, recording that Ms. Eisel's mood was stable,
22 she had no excess anxiety, she was able to maintain activities of
23 daily living, and had no deficits with regard to concentration,
24 persistence, and pace. Tr. 21.

25 The ALJ concluded that Ms. Eisel's allegation that she was
26 unable to work because of psychological symptoms was
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unsubstantiated by the treatment notes of Ms. Eisel's treating professionals and counselors.

The ALJ considered a third party statement dated July 25, 2005 from Ms. Eisel's mother, Judy Eisel. Tr. 71-78. The ALJ did not give the statement full credence because the limitations listed by Judy Eisel (Ms. Eisel's inability to go out alone, lack of confidence, difficulty trusting others, fear of job interviews, need to follow a routine) were mitigated or directly contradicted by activities and tasks also listed in the statement, such as Ms. Eisel's driving into town and shopping all day, going to medical appointments, caring for, supervising and participating in activities with her children, maintaining appropriate grooming, complying with medication regimens, and managing to live within her fixed income. Tr. 23.

Standard

The court must affirm the Commissioner's decision if it is based on proper legal standards and the findings are supported by substantial evidence in the record. Meanel v. Apfel, 172 F.3d 1111, 1113 (9th Cir. 1999). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. Richardson v. Perales, 402 U.S. 389, 401 (1971); Andrews v. Shalala, 53 F.3d 1035, 1039 (9th Cir. 1995). In determining whether the Commissioner's findings are supported by substantial evidence, the court must review the administrative record as a whole, weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion. Reddick

1 v. Chater, 157 F.3d 715, 720 (9th Cir. 1998). However, the
2 Commissioner's decision must be upheld even if "the evidence is
3 susceptible to more than one rational interpretation." Andrews, 53
4 F.3d at 1039-40.

5 The initial burden of proving disability rests on the
6 claimant. Meanel, 172 F.3d at 1113; Johnson v. Shalala, 60 F.3d
7 1428, 1432 (9th Cir. 1995). To meet this burden, the claimant must
8 demonstrate an "inability to engage in any substantial gainful
9 activity by reason of any medically determinable physical or mental
10 impairment which ... has lasted or can be expected to last for a
11 continuous period of not less than 12 months[.]" 42 U.S.C. §
12 423(d)(1)(A).

13 A physical or mental impairment is "an impairment that results
14 from anatomical, physiological, or psychological abnormalities
15 which are demonstrable by medically acceptable clinical and
16 laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). This
17 means an impairment must be medically determinable before it is
18 considered disabling.

19 The Commissioner has established a five-step sequential
20 process for determining whether a person is disabled. Bowen v.
21 Yuckert, 482 U.S. 137, 140 (1987); 20 C.F.R. §§ 404.1520, 416.920.
22 In step one, the Commissioner determines whether the claimant has
23 engaged in any substantial gainful activity. 20 C.F.R. §§
24 404.1520(b), 416.920(b). If not, the Commissioner goes to step two,
25 to determine whether the claimant has a "medically severe
26 impairment or combination of impairments." Yuckert, 482 U.S. at
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1 140-41; 20 C.F.R. §§ 404.1520(c), 416.920(c). That determination is
2 governed by the "severity regulation," which provides:

3 If you do not have any impairment or combination of
4 impairments which significantly limits your physical or
5 mental ability to do basic work activities, we will find
6 that you do not have a severe impairment and are,
7 therefore, not disabled. We will not consider your age,
8 education, and work experience.

9 §§ 404.1520(c), 416.920(c). If the claimant does not have a severe
10 impairment or combination of impairments, the disability claim is
11 denied. If the impairment is severe, the evaluation proceeds to the
12 third step. Yuckert, 482 U.S. at 141.

13 In step three, the Commissioner determines whether the
14 impairment meets or equals "one of a number of listed impairments
15 that the [Commissioner] acknowledges are so severe as to preclude
16 substantial gainful activity." Yuckert, 482 U.S. at 140-41. If a
17 claimant's impairment meets or equals one of the listed
18 impairments, he is considered disabled without consideration of her
19 age, education or work experience. 20 C.F.R. s 404.1520(d),
20 416.920(d).

21 If the impairment is considered severe, but does not meet or
22 equal a listed impairment, the Commissioner considers, at step
23 four, whether the claimant can still perform "past relevant work."
24 20 C.F.R. §§ 404.1520(e), 416.920(e). If the claimant can do so, he
25 is not considered disabled. Yuckert, 482 U.S. at 141-42. If the
26 claimant shows an inability to perform his past work, the burden
27 shifts to the Commissioner to show, in step five, that the claimant
28 has the residual functional capacity to do other work in
consideration of the claimant's age, education and past work

1 experience. Yuckert, 482 U.S. at 141-42; 20 C.F.R. §§ 404.1520(f),
2 416.920(f).

3 Discussion

4 Ms. Eisel asserts that the ALJ erred in failing to 1) give
5 full consideration to the report of Dr. Truhn; 2) provide clear and
6 convincing reasons for rejecting her testimony; and 3) give proper
7 credit to the lay evidence of Judy Eisel. She also contends that
8 the VE's testimony is inadequate to satisfy the Commissioner's
9 burden of showing that she retains the ability to perform work in
10 the national economy.

11 1. Failure to consider to Dr. Truhn's report

12 Ms. Eisel asserts that the ALJ failed to give clear and
13 convincing reasons, based on substantial evidence in the record,
14 for not giving conclusive weight to Dr. Truhn's finding that
15 personality testing revealed significant psychological turmoil and
16 distress, including agitation, ruminating thoughts, compulsive
17 behaviors, poor judgment, and distrust of others; his observations
18 that her parents appeared to make most of her decisions and that
19 Ms. Eisel appeared to have problems with concentration and
20 attention; and his suggestion of a sheltered workshop. She argues
21 that the ALJ erred in drawing the inference from Dr. Truhn's
22 endorsement of vocational services that Ms. Eisel could work,
23 because the ALJ overlooked the fact that Dr. Truhn suggested a
24 sheltered workshop rather than direct entry into the competitive
25 workforce.

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1 The ALJ stated in his opinion that he gave Dr. Truhn's
2 opinions "substantial weight" with respect to the diagnoses and Ms.
3 Eisel's noted anxiety symptoms, but concluded that Dr. Truhn had
4 not suggested that her mental impairments incapacitated her to the
5 extent that she could not work, "and in fact, his endorsement of
6 vocational placement implies that she could manage working." Tr.
7 20.

8 I find no error in the ALJ's consideration of Dr. Truhn's
9 opinions. Although Dr. Truhn's opinions are supported by the
10 psychological testing only he performed, they are inconsistent with
11 those of treating physician Dr. Telew, treating mental health
12 practitioner Lyman, and reviewing psychologist Dr. LeBray. As a
13 treating physician, Dr. Telew's opinion generally carries more
14 weight than that of Dr. Truhn, an examining psychologist, and Dr.
15 Truhn's opinion generally carries more weight than that of Dr.
16 LeBray, a reviewing psychologist. See, e.g., Holohan v. Massanari,
17 246 F.3d 1195, 1201 (9th Cir. 2001); 20 C.F.R. § 404.1527(d).

18 So long as the ALJ's findings are supported by substantial
19 evidence in the record as a whole, the court must uphold the
20 Commissioner's decision even if "the evidence is susceptible to
21 more than one rational interpretation." Andrews, 53 F.3d at 1039-
22 40. Dr. Truhn's suggestions about vocational rehabilitation and a
23 sheltered workshop can rationally be interpreted to mean that Ms.
24 Eisel was not precluded from working.

25 There is substantial evidence in the record to support the
26 ALJ's acceptance of the opinions of Doctors Telew and LeBray, and
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1 the assessment of Ms. Lyman and Dr. Waechter, over Dr. Truhn's
2 description of Ms. Eisel's symptoms. In March 2005, Dr. Truhn
3 found, on the basis of MMPI-II scores, indications of low self
4 esteem, depression, and obsessive/compulsive behaviors and
5 thinking. Ms. Lyman observed in July 2005 that Ms. Eisel had low
6 self esteem, but was beginning to have more independence from her
7 parents. Although Ms. Eisel presented with anxiety, she was also
8 observed by Ms. Lyman to be developing coping skills for managing
9 the anxiety. Ms. Lyman observed that after treatment, Ms. Eisel's
10 depression had decreased to "minimal to zero," and that she had a
11 positive attitude, increased social support, independence, and
12 confidence in herself as a parent. Ms. Lyman described Ms. Eisel as
13 "very focused, organized, some obsessiveness, excellent parent,"
14 and characterized Ms. Eisel's concentration, persistence and pace
15 as follows: "Client able to sustain focused attention when alone or
16 with one other person, but groups [sic] she has difficulty."

17 Dr. Telew's Mental Status report dated January 5, 2006, notes
18 that Ms. Eisel was euthymic, with a stable mood, intact cognition,
19 concentration, persistence and pace, no excess anxiety, and no
20 agitation. All of this evidence was cited by the ALJ. Dr. Telew's
21 notes for July 2006 to April 12, 2007, state "I do not support
22 disability" and "[P]atient terminated with me after I told her I
23 don't support disability." By April 2007, Dr. Telew's diagnoses
24 were personality disorder, "mild OCD," and social phobia.

25 2. Rejection of claimant's testimony

26 Ms. Eisel asserts that the ALJ erred in rejecting her
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1 testimony that it was difficult for her to deal with people, she
2 did not accept criticism well, she worked very slowly, and she was
3 not able to understand instructions. Ms. Eisel argues that this
4 testimony is corroborated by Dr. Truhn, Ms. Lyman, and, in
5 particular, the opinion of nurse practitioner Mary Fey that Ms.
6 Eisel's mental problems "prevent her from having adequate work
7 skills and behaviors."

8 The ALJ cited substantial evidence to support his rejection of
9 this testimony, to the extent that it was rejected. First, the ALJ
10 accepted Ms. Eisel's testimony that it was difficult for her to
11 deal with people by including in his residual functional assessment
12 limited contact with co-workers and no contact with the general
13 public. Ms. Eisel's statement that she did not accept criticism is
14 not corroborated by any objective source in the record, and is
15 inconsistent with observations by professionals that she had a
16 positive attitude, worked on developing appropriate coping skills,
17 and attended counseling sessions on a regular basis. Although Ms.
18 Eisel testified that when she worked she was very slow, this
19 statement is not corroborated even by Dr. Truhn, who found that she
20 functioned in the low average range of intellectual ability, did
21 not have a learning disability, and was in the borderline range of
22 ability in the area of freedom from distractibility. Further, as
23 the ALJ found, Dr. Truhn did not opine that Ms. Eisel's impairments
24 precluded her from working. The ALJ also cited to the findings of
25 other practitioners that were inconsistent with this testimony,
26 such as Ms. Lyman's opinion that Ms. Eisel was very focused,

1 organized, and able to sustain attention when alone or with another
2 person, and Dr. Telew's observation that Ms. Eisel's cognition and
3 concentration, persistence and pace were intact and that she had no
4 excess anxiety or agitation.

5 The ALJ properly rejected Mary Fey's opinion that Ms. Eisel's
6 "mental illnesses prevent her from having adequate work skills and
7 behaviors." Tr. 264.⁴ As the ALJ noted, there is no indication in
8 the record that Ms. Fey had assessed Ms. Eisel's occupational
9 limitations or work skills, and in the document itself Ms. Fey
10 suggests getting "more detailed information regarding her
11 disability" from Dr. Telew. Id. Ms. Fey's letterhead contains only
12 her own name and that of another nurse practitioner; there is no
13 suggestion in the document that she works under the supervision of
14 a physician or psychologist. As a nurse practitioner working her
15 own, Ms. Fey is not an acceptable medical source. Gomez v. Chater,
16 74 F.3d 967 (9th Cir. 1996).

17 **3. Failure to accept statements of Judy Eisel**

18 Ms. Eisel asserts that the ALJ did not give proper credit to
19 the lay evidence of Judy Eisel that Ms. Eisel takes all day to
20 clean her house, spends lots of time on meals, although they are
21 mostly packaged and prepared foods, spends all day shopping for an
22 item, then takes it back, cannot balance her checkbook, has very
23 few friends, and "goes to pieces" in response to stress. I am
24 unpersuaded by this argument. The ALJ properly took Judy Eisel's
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26 ⁴ The statement appears as a one-sentence conclusion in a
27 four sentence document.

1 statements about Ms. Eisel's activities and symptoms into account,
2 see Dodrill v. Shalala, 12 F.3d 915, 919 (9th Cir. 1993) and gave
3 specific reasons germane to Judy Eisel's testimony for discounting
4 portions of it. Id.; Stout v. Commissioner, 454 F.3d 1050, 1053 (9th
5 Cir. 2006). The internal inconsistencies in the statement are
6 sufficient to warrant the ALJ's decision not to accept it in full.

7 **4. Failure to carry burden of proving claimant can perform**
8 **work in the national economy**

9 Ms. Eisel asserts that the VE's testimony is not sufficient to
10 meet the Commissioner's burden of proving that she retains the
11 residual functional capacity to perform work in the national
12 economy, because the ALJ failed to include in his hypothetical to
13 the VE Ms. Eisel's testimony about "marked limitation in her
14 ability to accept instructions and respond appropriately to
15 criticism," and her tendency to "focus too much on details and work
16 very slowly." As a threshold matter, I note that "marked"
17 limitations were not in Ms. Eisel's testimony, but in the questions
18 posed to the VE by Ms. Eisel's attorney.

19 In any case, as discussed above, limitations on accepting
20 instructions and responding to criticism, and working slowly, are
21 supported only by Ms. Eisel's testimony at the hearing, which the
22 ALJ found not credible because unsupported by objective evidence or
23 observations by mental health practitioners. I find no error.

24 **Conclusion**

25 I recommend that the Commissioner's decision be affirmed.

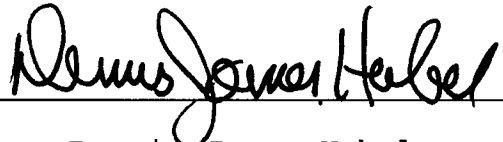
26 **Scheduling Order**

27 These Findings and Recommendation will be referred to a

1 district judge. Objections, if any, are due November 4, 2009. If
2 no objections are filed, then the Findings and Recommendation will
3 go under advisement on that date.

4 If objections are filed, then a response is due November 18,
5 2009. When the response is due or filed, whichever date is earlier,
6 the Findings and Recommendation will go under advisement.

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8 Dated this day of October 20, 2009.

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12 Dennis James Hubel
13 United States Magistrate Judge
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